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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

KATHRYN DEAN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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July 18, 1985

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QUESTIONS PRESENTED FOR REVIEW

1. Whether in the federal criminal trial of a black defendant for welfare fraud the essential demands of fairness were violated by the trial court's refusal to ask requested voir dire questions designed to elicit racial bias or prejudice.

2. Whether the federal appellate courts' supervisory power requires the federal trial court in the prosecution of a black defendant for welfare fraud to ask requested voir dire questions which were designed to identify racial bias or prejudice.

3. Whether in the federal criminal trial of a black defendant for welfare fraud the essential demands of fairness were violated by the trial court's refusal to ask requested voir dire questions designed to elicit the prospective jurors' attitudes toward receipt of public assistance benefits.

4. Whether in a federal criminal trial the trial court must propound requested voir dire questions regarding prospective jurors propensity to afford greater weight to the testimony of law enforcement officers where a key witness is an F.B.I. Agent.

5. Whether in the federal criminal trial of a black defendant for welfare fraud the trial court's refusal to ask requested voir dire questions designed to identify racial prejudice, attitudes toward public assistance and the weight given to a law enforcement officer's testimony prevented defendant from effectively asserting peremptory challenges and challenges for cause depriving defendant of her Sixth Amendment right to trial by an impartial jury.

6. Whether admission of irrelevant and highly prejudical evidence of alleged other wrongful conduct without limiting instructions or without a showing of necessity to the government's case violated the essential demands of fairness by permitting the government to try petitioner for the uncharged wrongful conduct.

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NO. _____

IN THE

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OCTOBER TERM, 1985

KATHRYN DEAN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

Petitioner, KATHRYN DEAN, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 23, 1985.

OPINION BELOW

The unreported memorandum decision of the Court of Appeals for the Ninth Circuit appears in Appendix 1.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 23, 1985. This petition for certiorari was filed within sixty (60) days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

RELEVANT STATUTORY PROVISIONS

The Sixth Amendment to the Constitution of the United States provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature

and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Petitioner was charged in a single count indictment filed in the United States District Court for the Northern District of California with violation of 18 U.S.C. Section 641 (theft of government property). (CT 1)[1] Petitioner filed her 176 requested voir dire questions on August 30, 1984, pursuant to the district court's order. (CT 20) Petitioner, a black defendant charged with what is commonly known as "welfare fraud", filed comprehensive voir dire requests inquiring into racial bias or prejudice, attitudes toward public assistance,

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1/ CT refers to Clerk's Transcript. RT refers to Reporter's Transcript.

and propensity to afford greater weight to testimony of law enforcement officers. (CT 20) The Reporter's Transcript demonstrates that the terms "welfare fraud" and "fraud" were liberally used during Petitioner's trial, particularly by Government witnesses. (See e.g., RT 227, 230, 274, 287-288, 289, 394)

The voir dire examination, conducted solely by the court, commenced with the trial court inquiring regarding the jurors' addresses, occupations, places of occupation and spouses' occupations. (RT 25-30) The trial court specifically refused to ask any of the thirty (30) requested voir dire questions regarding racial bias or prejudice. (RT 34) (See CT 20: #33-62)

The trial court also specifically refused to ask any of the requested voir dire questions regarding attitudes toward public assistance. (RT 34) (See CT 20: #9, 10, 21-24, 56 and 57)

Finally, the trial court specifically refused to ask any of the requested voir dire questions regarding propensity to afford greater weight to testimony of law enforcement officers (RT 34) (See CT 20: #67-73) The trial court's only question on law enforcement officers simply inquired whether prospective jurors had a law enforcement officer in their immediate family. (RT 40-41)

The trial court never used the words "race", "race prejudice", and "black" during its voir dire examination of prospective jurors,

Following the initial demographic questions, the trial court conducted the voir dire by posing questions to the entire jury and calling for a show of hands. The trial court asked the jurors whether they would be prejudiced in favor of or against conviction based on anything in the nature of the offense charged. (RT 42) The trial court also asked the jury: "Now,

if you have observed or now observe anything whatever about the defendant, which in anyway, however subtly might prejudice you against her, please raise your hand." (RT 42)

Just prior to the peremptory challenge stage the trial court asked the following extended question:

"Now, I think that this next question is perhaps the most important one of all. It's a hypothetical question, and I'm going to read it and then explain it a little bit: If you were the defendant in this case, and if for any reason, knowing yourself as you do, you would not be willing to be tried by a jury composed of twelve persons exactly like you, I'm going to ask you in a moment to please raise your hand.

Now, let me tell you what that question entails. If you have any prejudice of any kind involving the nature of the offense, or the -- in regard to the defendant, in any way, based upon any observation of her, or if, for example, your health is

so bad you don't think you can pay careful attention to the evidence, or if you're so worried about something that you can't really pay attention to the evidence and give this case your best attention, then in a moment I'm going to ask you to raise your hand. And I will now reread the question.

I might say that this case probably will finish up this week, or maybe even mid-week. I'm not sure. One never can tell about these things. I haven't heard the evidence, and I know very little more about the case than any juror here. Probably somewhat -- probably no more.

Well, I will repeat: If you were the defendant in this case, and if for any reason, knowing yourself as you do, you would not be willing to be tried by a jury composed of twelve persons exactly like you, please raise your hand?" (RT 44-45)

Over the objections of petitioner's counsel, the trial court admitted testimonial

evidence concerning uncharged criminal conduct. The trial court permitted into evidence testimony by informant Turner-Stroud alleging that the petitioner filed false claims while working at Blue Cross. In addition, the court allowed in evidence regarding participation in an uncharged, large-scale welfare fraud by petitioner. The evidence was in the form of testimony of Hutcherson (RT 390-401), a convicted welfare fraud conspirator and admitted head of a ring of such conspirators, and of F.B.I. Agent Moulton (RT 287-293).

Petitioner was convicted on September 19, 1984. (CT 32; RT 486) Petitioner. appealed her conviction and the Ninth Circuit affirmed petitioner's conviction in a judgment entered May 23, 1985 (Appendix 1).

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING VOIR DIRE TO ELICIT RACIAL BIAS OR PREJUDICE IN FEDERAL COURT TRIALS OF MINORITY DEFENDANTS.

A. THE DECISION BELOW CONFLICTS IN PRINCIPAL WITH THE SUPREME COURT DECISIONS CONSTITUTIONALLY MANDATING DIRECT INQUIRY INTO RACIAL PREJUDICE WHEN THE CIRCUMSTANCES IN THE CASE SUGGEST A SIGNIFICANT LIKELIHOOD THAT THE JURY WOULD NOT BE IMPARTIAL ABSENT QUESTIONING REGARDING RACIAL BIAS OR PREJUDICE.

Over fifty years ago, Chief Justice Hughes announced the governing rule and stated:

"The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more

injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute. (Aldridge v. U.S., 283 U.S. 308, 314-315; 51 S.Ct. 470, 473; 75 L.Ed. 1054 (1931))

More recently, the Supreme Court ruled that the refusal to make any inquiry as to the racial bias of the prospective jurors after the Defendant's timely request for such an inquiry was reversible error (Ham v. South Carolina, 409 U.S. 924; 93 S.Ct. 848; 35 L.Ed. 2d 46 (1973). See also U.S. v. Bowles, 574 F.2d 970 (8th Cir. 1978) at 971, held the defendant was denied a fair trial because the District Court refused to ascertain whether any of the prospective jurors would

be influenced in arriving at a verdict because the defendant was black.

In Ristaino v. Ross, 424 US 589, 596, the Supreme Court explained that its earlier decision in Ham v. South Carolina, 409 US 524 (1973) did not announce a requirement of universal Voir Dire on racial prejudice, but rather "reflected an assessment of whether under all the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors "would not be impartial." The Ristaino, supra, court stated that the racial issues in Ham "were inextricably bound up with the conduct of the trial." (At 597)

Application of the rules enunciated in the Ristaino, supra, and Ham, supra, decisions to the instant case clearly mandate the trial court's direct inquiry

into racial prejudice.

It is important to note that in Rosales-Lopez v. U.S. 451 US 182 (1981) the Court agrees with the holding in Aldridge v. U.S., 283 U.S. 308, 314-315. (At 191) The court added:

"In our judgment, it is usually best to allow the defendant to resolve this conflict by making the determination of whether or not he would prefer to have the inquiry into racial or ethnic prejudice pursued. [7] Failure to honor this request, however, will be reversible error only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury." (At 191)

The Rosales-Lopez, supra, court, at 191, n. 7, continued:

"Of course, the judge need not defer to a defendant's request where

there is no rational possibility of racial prejudice. But since the courts are seeking to assure the appearance and reality of a fair trial, if the defendant claims a meaningful ethnic difference between himself and the victim, his Voir Dire request should ordinarily be satisfied."

This Court is well aware of the history and the presence of racial prejudice in American society. In addition, the population at large is commonly known to harbor strong feelings regarding public assistance and welfare fraud. Thus, when a black defendant is tried for welfare fraud there is a reasonable, rational possibility and a constitutionally significant likelihood under these circumstances that racial prejudice will influence the jury when the trial court refuses the defendant's requested

voir dire inquiry regarding racial prejudice.

B. THE DECISION BELOW CONFLICTS IN PRINCIPAL WITH THE SUPREME COURT DECISION IN RISTAINO v. ROSS, MANDATING THAT FEDERAL TRIAL COURTS, PURSUANT TO THE FEDERAL APPELLATE COURTS' SUPERVISORY POWERS, PROPOUND REQUESTED VOIR DIRE QUESTIONS TO IDENTIFY POSSIBLE RACIAL BIAS OR PREJUDICE.

Even if, arguendo, the trial court did not have a constitutional duty to ask voir dire questions regarding racial prejudice, federal trial courts have a non-constitutional duty to present appropriate questions regarding possible racial bias of prospective jurors when the defendant is a member of a racial minority group (U.S. v. Bowles, 574 F.2d 970, 973, fn. 3 (8th Cir. 1978), citing to Aldridge v. U.S., 283 U.S. 308 (1931) and Ristaino v. Ross, 424 U.S. 589, 597 n. 9 (1976); see also Ham v. South Carolina, 409 U.S. 524 (1973)).

The Court in both its Rosales-Lopez, supra, and Ristaino, supra, decisions raised the possibility of invoking "supervisory powers" of the Federal Appellate Courts. The Rosales-Lopez, supra, court, at 191-192 commented, "in Ristaino, the court also made clear that the result reached in Aldridge, was based on this court's supervisory power over the Federal Courts. 424 U.S., at 598, n. 10."

Federal Appellate Court supervisory powers were not invoked in Ristaino v. Ross, supra, because the matter arose from a state court. However, the Ristaino court stated, "a Federal Trial Court would have been required to "propound appropriate questions designed to identify racial prejudice if requested by the defendant." 424 U.S., at 597, n. 9." (At 191)

The Rosales-Lopez court found that there was no need to inquire into racial prejudice against a Mexican-American defendant where the trial court had already questioned the prospective jurors as to their attitudes toward aliens. (at 193) The Rosales-Lopez trial court even went to the extent of excusing two jurors for cause, based upon their responses to the inquiry regarding aliens. (at 193) The Supreme Court found that the removal of these jurors eliminated any reasonable possibility that the remaining jurors would be influenced against the defendant by an undisclosed racial prejudice toward Mexicans and that further questioning therefore was not necessary. (At 193)

The facts in Rosales-Lopez, supra, are clearly distinguishable from the facts of the instant case. In Rosales-

Lopez, supra, the trial court made a specific inquiry into prejudice against aliens. However, in the instant case, the Trial Court failed to make any inquiry whatsoever regarding bias against appellant on account of race, attitudes toward public assistance or attitudes toward the testimony by law enforcement officers. This Court should therefore provide specific guidance to federal trial courts on the issue by resolving it squarely in light of Ristaino v. Ross.

II

THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE ESSENTIAL DEMANDS OF FAIRNESS REQUIRE TRIAL COURTS TO SUBMIT REQUESTED VOIR DIRE QUESTIONS CONCERNING RECEIPT OF ANY GOVERNMENT BENEFITS IN A PROSECUTION REGARDING GOVERNMENT BENEFITS

The Seventh Circuit has held that it is an abuse of discretion for the trial court to refuse to submit

to jurors questions regarding receipt of any government pension or any government benefits in a prosecution for non-payment of Social Security taxes (U.S. v. Martin 507 F2d 428 (7th Cir. 1974)). The opinion below of the Ninth Circuit conflicts with the Seventh Circuit in principal by refusing to require the requested voir dire questions regarding jurors' receipt of public assistance and their attitudes toward public assistance in the instant prosecution for welfare fraud. This court should therefore provide specific guidance to federal courts on the issue by resolving it squarely.

III

WHERE A KEY WITNESS IS AN F.B.I. AGENT THE ESSENTIAL DEMANDS OF FAIRNESS REQUIRE TRIAL COURTS TO ASK REQUESTED VOIR DIRE QUESTIONS REGARDING PROSPECTIVE JURORS' PROPENSITY TO AFFORD GREATER WEIGHT TO THE TESTIMONY OF LAW ENFORCEMENT OFFICERS

The Court of Appeals in U.S. v. Baldwin, 607 F.2d 1295, 1298 (9th Cir. 1979) stated:

"All Circuits appear to be in agreement that the refusal to ask the question of whether the prospective jurors would be unduly influenced by the testimony of a law enforcement officer does not always constitute reversible error; that question hinges upon such factors as the importance of the government agent's testimony to the case as a whole; the extent to which the questions concerning venire-person's attitude toward government agents is covered in other questions on voir dire and on the charge to the jury, the extent to which the credibility of the government agent-witness is put

it to issue and the extent to which the testimony of the government agent is corroborated by the non-agent witnesses."

In the instant case, Agent Moulton was the only law enforcement officer to testify in the trial, and he testified both as to conversations with the Petitioner and to the investigation of the entire welfare fraud scheme (RT 273).

The trial court's only voir dire questions on law enforcement officers simply inquired whether the jurors had a law enforcement officer in their family (RT 40-41). Thus, Petitioner had no way to learn of the jurors' attitudes toward such officers' testimony. (See also: Brown v. U.S., 338 F.2d 543 (D.C. Cir. 1964); U.S. v. Martin, 507 F.2d 428 (7th Cir. 1974).

IV

THE DECISION BELOW RAISES SIGNIFICANT PROBLEMS BY PERMITTING THE TRIAL COURT TO REFUSE TO ASK REQUESTED VOIR DIRE QUESTIONS DESIGNED TO IDENTIFY RACIAL PREJUDICE, ATTITUDES TOWARD PUBLIC ASSISTANCE AND PROPENSITY TO AFFORD GREATER WEIGHT TO A LAW ENFORCEMENT OFFICER'S TESTIMONY AND PREVENTS PETITIONER FROM EFFECTIVELY ASSERTING CHALLENGES THUS DEPRIVING HER OF HER SIXTH AMENDMENT RIGHT TO TRIAL BY AN IMPARTIAL JURY.

The Sixth Amendment guarantees an accused the right to a trial "by an impartial jury." Voir dire, the critical procedure used to obtain an impartial jury, must be sufficiently extensive so as to permit the selection of impartial jurors. "(T)he right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." (Irvin v. Dowd, 366 U.S. 717, 722; 81 S.Ct. 1639-1642; 6 L.Ed.2d 751 (1961)).

The Sixth Amendment guaranty of the right to assistance of counsel has been interpreted to mean the right to

effective aid of counsel (Avery v. Alabama, 308 U.S. 444, 446 (1940)). The right to a fair trial has been interpreted to include the right to jury challenge (Pointer v. U.S., 151 U.S. 396, 408 (1894)). The right to challenge includes the right to an effective voir dire (Ham v. South Carolina, 409 U.S. 524, 532 (1973) (Marshall J. concurring in part and dissenting in part).

"Inhibition of the right to challenge peremptorily or for cause is usually deemed prejudicial error without a showing of actual prejudice." (U.S. v. Allsup, 566 F.2d 68, 71 (9th Cir. 1977), citing Swain v. Alabama, 380 U.S. 202, 219; 85 S.Ct. 824; 13 L.Ed.2d 759 (1965), also citing to U.S. v. Turner, 558 F.2d 535, 538-539 (9th Cir. 1977).

In the instant case, the trial court's refusal to permit any questions regarding racial bias or receipt of public assistance or credibility of law enforcement officers,

alone, so limited the voir dire that the defense counsel was unable to make an informed exercise of his peremptory challenges.

The Fifth Circuit Court of Appeals has bluntly addressed the problem:

"Peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes. (U.S. v. Ledee, 549 F.2d 990, 993 (5th Cir. 1977), cited with approval by U.S. v. Ible, 630 F.2d 389 (5th Cir. 1980); see also U.S. v. Booker, 480 F.2d 1310 (7th Cir. 1973)).

This Court should therefore provide specific guidance to federal courts on the issue by resolving it squarely.

V

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING ADMISSION OF EVIDENCE OF UNCHARGED OTHER WRONGFUL CONDUCT

During the government's examinations of prosecution witnesses Turner-Stroud, Moulton and Hutcherson, the U.S. attorney repeatedly raised uncharged other wrongful conduct allegedly committed by the Petitioner.

The Court in U.S. v. Bailleaux, 685 F.2d 1105, 1109 (9th Cir. 1982) stated that courts must be extremely cautious in admitting evidence of alleged other wrongful conduct or crimes because of the danger that defendants would be convicted because they have a previous criminal offense rather than because the Government has introduced evidence that sufficiently proves beyond a reasonable doubt that they are guilty of the offense for which they are charged and being tried. The court stated: "for that reason, the use

of such evidence must be narrowly circumscribed and limited. See generally Fed. R. Evid. 403, 404; U.S. v. Powell, 587 F.2d 443, 448-449 (9th Cir. 1978) (use of marijuana conviction to raise inference that defendant was disposed to commit marijuana offenses is prohibited; (U.S. v. Calvert, 523 F.2d 895, 907 (8th Cir. 1975)), cert. denied, 424 U.S. 911, 96 S.Ct. 1106, 47 L.ed.2d 314 (1976) (if evidence of other crimes is admitted, court should give limiting instruction indicating narrow purpose for which evidence may be used)."

The court in Bailleaux, supra, at 1110 requires that "proof that the defendant committed the other crime must be clear and convincing". The Government offered no other testimony than that of the informant Turner-Stroud, who admitted that she had wrongfully taken welfare checks, (RT 219-222) had two social security numbers and that she used one of the

social security numbers to collect funds wrongfully on a disability claim while employed by Blue Cross, (RT 235) she received money for processing a fraudulent claim at Blue Cross. (RT 237) Turner-Stroud is the only witness which the Government presented to prove the alleged making of false claims by appellant. In contrast, in U.S. v. Bailleaux, supra, at 1111, the court noted that, "the Government produced several witnesses who testified most persuasively as to appellant's commission of the Oregon offenses . . . "

The allegation that appellant was involved in the widespread welfare fraud scam also introduced evidence of an uncharged conspiracy occurring contemporaneously with the charged offense. By admitting this evidence of the widespread fraud, the court permitted the Government to try appellant for the uncharged conspiracy

which resulted in unfair prejudice to appellant. This Court should therefore provide specific guidance to federal courts on the issue by resolving it squarely.

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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DATED: July 18, 1985

APPENDIX 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KATHRYN DEAN, Defendant-Appellant.	NO: 84-1321 D.C. No. 84-0485 SAW MEMORANDUM *

Appeal from the United States District Court for the Northern District of California
Stanley A. Weigel, District Judge, presiding
Argued and Submitted April 8, 1985
Memorandum filed May 23, 1985
Stamped: Not for Publication

Before: HALL and WIGGINS, Circuit Judges, and SMITH,** District Judge.

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit, save as provided in Rule 21(c).

**Honorable Russell E. Smith, Senior United States District Judge for the District of Montana, sitting by designation.

By this appeal the defendant, KATHRYN DEAN (DEAN), challenges a jury verdict finding her guilty of theft of government property in violation of 18 U.S.C. Section 641. DEAN claims that the district court erred in refusing to make more detailed inquiries into jury attitudes regarding race, welfare benefits, and the weight to be given testimony by law enforcement officials. DEAN also claims that the district court committed a number of errors in the conduct of the trial and the admission of evidence. We reject DEAN'S arguments and affirm the jury verdict.

BACKGROUND:

The record indicates that DEAN was a relatively small part in a large welfare fraud. DEAN received and cashed 24 Aid to Families with Dependent Children (AFDC) checks which were falsely issued by Willette Hutcherson (Hutcherson), an employee of the Alameda County Social Services Agency. DEAN returned one-third

of each check to Hutcherson. DEAN has a degree in the administration of justice. She had no children of her own. Moreover, DEAN has had experience in handling claims through her employment with Blue Cross. Yet DEAN'S only defense at trial was that she thought she was entitled to the AFDC checks because she had previously been turned down on an unrelated welfare application.

DISCUSSION:

I. VOIR DIRE

At trial DEAN submitted 176 proposed voir dire questions and requested the district court to allow counsel to conduct voir dire. The district judge denied DEAN'S request, and asked his own questions on some of the issues raised by DEAN'S proposed questions. Under Fed. R. Crim. P. 24(a) the trial judge may conduct voir dire himself or allow counsel to conduct it. The trial court's actions in conducting voir dire are reviewed for an abuse of discretion. Rosales-Lopez v. United States,

451 U.S. 182, 188-89 (1981); United States v. Jones, 722 F.2d 528, 529 (9th Cir. 1983); United States v. Baldwin, 607 F.2d 1295, 1297 (9th Cir. 1979). No abuse of discretion exists if the voir dire is reasonably sufficient to test the jury for bias or partiality. Jones, 722 F.2d at 1297. We review the alleged errors regarding race, attitudes towards the testimony of law enforcement officials, and attitudes towards welfare recipients separately.

A. Race.

In Rosales-Lopez the Supreme Court addressed the need for specific voir dire questions regarding racial prejudice under the sixth amendment and the Court's supervisory powers. 451 U.S. at 188-92. The Court held that specific voir dire questions regarding racial prejudice are only constitutionally required where "special circumstances" create a substantial likelihood of racial or ethnic prejudice. Id. at 189-90. Turning to the relationship between its supervisory powers over lower

courts and voir dire questions regarding racial prejudice, the Court found that the failure to grant a defendant's request for specific questions regarding race "will be reversible error only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury." Id. at 191. Although the Court noted that the better practice is to grant a defendant's specific request for voir dire questions regarding race in all cases where the defendant is a member of a racial minority, id., the Court concluded that the prosecution of Rosales-Lopez for transporting illegal aliens did not present special circumstances or a reasonable possibility of prejudice. Id. at 192-94.

We find no special circumstances or reasonable possibility of prejudice in this case. This case, like Rosales-Lopez, simply involves a minority defendant. Moreover, the district judge's voir dire tested for the possibility of racial prejudice by asking

the jurors if they had "observed or now observe anything whatever about the defendant, which in any way, however subtly, might prejudice you against her." While it would have been better practice for the district judge to ask a specific questions regarding racial prejudice when DEAN requested such a question, the district judge's approach was not reversible error under the Rosales-Lopez standard.

B. Law Enforcement Testimony.

In determining whether the failure to voir dire for jury bias in favor of law enforcement testimony constitutes an abuse of discretion, we consider the importance of the law enforcement official's testimony to the case, the extent to which other voir dire questions elicit attitudes towards law enforcement officials, the extent to which the credibility of the law enforcement officer is put at issue, and the extent to which the testimony of the law enforcement official is corroborated by non-law enforcement official testimony. Baldwin, 607 F.2d

at 1298. Compare Darbin v. Nourse, 664 F.2d 1109, 1112-15 (9th Cir. 1981), (failure to voir dire for law enforcement bias reversible error in Section 1983 action by prisoner against prison official), with United States v. Golden, 532 F.2d 1244, 1247 (9th Cir.) (per curiam) (not reversible error to refuse voir dire inquiry into law enforcement bias where there was no question as to custom official's credibility, no conflict between the official's testimony and lay witness' testimony, and contested issues were decided largely on circumstantial evidence), cert. denied, 429 U.S. 842 (1976). In practical terms we think that it is best to honor a defendant's request for voir dire regarding jury bias in favor of law enforcement testimony in all cases where the court is advised that law enforcement officials will testify. Voir dire questions regarding bias in favor of law enforcement testimony do not lengthen or complicate the voir dire process, and such inquiries eliminate the possibility

of reversal and the need for case-by-case review by an appellate court.

In this case the district judge asked the jurors whether they were related to law enforcement officials, but did not inquire as to the weight they would give law enforcement testimony. Although we think the district judge should have honored DEAN'S request, his failure to do so was not reversible error on the facts of this case. Special Agent Moultan (Moulton) of the FBI was the only law enforcement official who testified. Moulton's credibility was not at issue, and his testimony did not conflict with DEAN's testimony in such a way that the jury would be making a choice between his version of events and DEAN'S.

C. Welfare.

The district judge asked the jurors whether there was "anything in the nature of the offense charged" against DEAN which might prejudice them for or against conviction. The district judge did not ask the specific

questions on welfare attitudes which DEAN requested. After the district jduge questioned the jury regarding the nature of the offense, one juror volunteered that he objected to welfare as a general principal. Even assuming that a court should inquire into juror attitudes towards welfare in welfare fraud cases, the district judge's question on the nature of the offense was reasonably sufficient to test for this bias. DEAN'S suggested detailed voir dire inquiries into juror attitudes regarding welfare were not necessary on the facts of this case.

II. OTHER ALLEGED ERRORS.

A. False Blue Cross Claims

DEAN claims that the district court erred in admitting evidence that DEAN filed false claims for prescription drugs with Blue Cross, her former employer. The trial court's decision to admit evidence of similar crimes under Rule 404(b) is reviewed under the abuse of discretion standard. United v. Bradshaw, 690 F.2d 704, 708 (9th Cir.

1982), cert. denied, ___ U.S. ___, 103 S. Ct. 3543 (1983). Rule 404(b) prohibits the introduction of evidence of other crimes unless the evidence demonstrates "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." We find that DEAN'S false claims with Blue Cross were admissible as evidence of intent or absence of mistake. See United States v. Ruster, 712 F.2d 409, 411-12 (9th Cir. 1983) (evidence of prior false social security claims admitted where insanity was argued as the sole defense in prosecution for later false claims).

The false Blue Cross claims were close in time to the AFDC fraud, and DEAN'S prior fraudulent conduct was relevant since DEAN'S intent regarding the welfare checks was at issue. See United States v. Bailleaux, 685 F.2d 1105, 1109-11 (9th Cir. 1982). The false claims evidence was prejudicial, but the probative value of the evidence was not "substantially outweighed" by its prejudicial

effect as is required to exclude relevant evidence under Fed. R. Evid. 403. Id. at 1110-12.

On appeal DEAN argues that the district court should have given a limiting instruction on the purpose for which the false claims were admitted. See Bailleaux, 685 F.2d at 1112. The failure to give a limiting instruction, however, is not reversible error where no instruction has been requested. United States v. Long, 706 F.2d 1044, 1053 (9th Cir. 1983). DEAN'S cousnel did not request a limiting instruction on this issue at trial, so none was required.

B. The Larger Fraud.

DEAN also argues that the district court erred in allowing Moulton to testify that the checks which DEAN received and cashed were part of a $1.2 million dollar welfare fraud. We review the district court's decision to admit this testimony in spite of its prejudicial effect for an abuse of discretion. Bradshaw, 690 F.2d at 708.

We find no abuse of discretion.

By the time Moulton testified that the value of the welfare fraud engineered by Hutcherson was 1.2 million dollars, Stroud had already testified, without objection, that the checks which DEAN had received and cashed were part of a larger fraud engineered by someone employed by the Alameda County Social Services Agency. Moulton's testimony gave the jury background on why Stroud was granted immunity, and expanded on Stroud's testimony regarding the overall welfare fraud only by placing a dollar value on the fraud. Given Stroud's prior testimony, Moulton's testimony was not highly prejudicial. The district judge did not abuse his discretion in determining that the probative value of Moulton's testimony was not substantially outweighed by its prejudicial effect. Furthermore, the district jduge cautioned the jury that Moulton's testimony regarding the larger fraud was introduced only to explain the grant of immunity, and was not to be considered as evidence that DEAN was

involved in the larger fraud. Such cautionary instructions are presumed effective. United States v. Johnson, 618 F.2d 60, 62 (9th Cir. 1980).

C. Miscellaneous.

We reject DEAN'S allegations that the district court erred in: (1) allowing Hutcherson to testify as a rebuttal witness; (2) denying DEAN'S motion for mistrial; (3) denying DEAN'S motion for a continuance; (4) admitting evidence over hearsay and relevancy objections; (5) assisting the prosecution in the formulation of questions at trial; and (6) failing to give DEAN'S proposed instructions on the elements of the offense and circumstantial evidence. We find no support for these alleged errors in the record.

AFFIRMED.

Supreme Court, U.S.
FILED
OCT 31 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-109

In the Supreme Court of the United States

OCTOBER TERM, 1985

KATHRYN DEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court failed to make sufficiently detailed voir dire inquiries concerning prospective jurors' attitudes about race, welfare benefits, and the testimony of law enforcement officers.

2. Whether the district court erred in admitting evidence of petitioner's involvement in similar crimes.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1985. The petition for a writ of certiorari was filed on July 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of theft of government property, in violation of 18 U.S.C. 641. She was sentenced to two years' imprisonment and a $10,000 fine. She was also ordered to pay $7000 in restitution. The court of appeals affirmed (Pet. App. 1-13).

1. The evidence at trial, summarized in the opinion of the court of appeals (Pet. App. 2-3), established that between June 1982 and September 1983 petitioner received and cashed 24 federal welfare checks that were fraudulently issued by Willette Hutcherson, a county welfare agency employee (*id.* at 2). The checks, issued under the Aid to Families with Dependant Children (AFDC) program, totaled almost $15,000. Petitioner asserted, as her sole defense, that she had received a call from an unidentified person at the welfare office who told her that she was entitled to the checks as retroactive benefits under a previously denied welfare application (*id.* at 2; Tr. 338-340). However, petitioner had no children, had not applied for AFDC benefits, and returned one-third of the proceeds from each check to Hutcherson (*id.* at 2-3; Tr. 100, 330, 399-400).

2. Prior to trial, petitioner submitted 176 proposed voir dire questions (Pet. App. 3). Approximately 30 of the questions addressed the prospective jurors' attitudes toward blacks. Other questions addressed their attitudes toward the offense charged and the credence they would give to the testimony of law enforcement officers. The district judge denied petitioner's specific requests, but asked questions on some of the issues raised by petitioner's proposed questions. Among his questions, he asked whether the prospective jurors had observed "anything whatever about the defendant, which in any way, however subtly, might prejudice [them]" (*id.* at 6; Tr. 42). He also asked whether there was "anything in the nature of the offense charged" that affected their impartiality (see *id.* at 8; Tr. 43).

During the trial, the district judge admitted evidence, over petitioner's objection, that petitioner had filed false claims for prescription drugs (Pet. App. 9). He also admitted testimony, over petitioner's objection, that petitioner's

activities were part of a much larger welfare fraud scheme (*id.* at 11).

3. The court of appeals, applying an abuse of discretion standard, held that the district judge conducted an adequate voir dire (Pet App. 4-9). Relying on *Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981), it first concluded that the judge was not obligated to conduct special questioning concerning racial prejudice (Pet. App. 5). The court observed that this case involved neither special circumstances nor reasonable possibility of racial prejudice (*ibid.*). It suggested that the "better practice" might be to conduct special questioning when the defendant is a member of a racial minority (*id.* at 6), but held that the failure to do so did not constitute reversible error (*ibid.*). The court also noted that the district judge had asked, in general terms, whether the jurors were in any way prejudiced against petitioner (*ibid.*).

The court of appeals next suggested that the district judge should have honored petitioner's request for special questioning concerning potential bias in favor of law enforcement testimony, but it concluded that the failure to do so in this case did not constitute reversible error (Pet. App. 8). The court noted that only one law enforcement officer testified, his credibility was not disputed, and his testimony did not conflict with petitioner's testimony (*ibid.*). It further ruled that the district court's inquiry into juror prejudice concerning the "offense charged" eliminated any need to honor petitioner's specific requests for voir dire on juror attitudes toward welfare fraud (*id.* at 9).

Turning to the evidentiary challenges, the court concluded that the district judge did not abuse his discretion in admitting evidence indicating that petitioner had filed false prescription drug claims with her former employer (Pet. App. 9-11). The court observed that the probative value of the evidence was not substantially outweighed by its

prejudicial effect (*id.* at 10-11). The court likewise affirmed the district judge's admission of testimony indicating that petitioner's activities were part of a larger welfare fraud scheme (*id.* at 11-13).

ARGUMENT

Petitioner contends (Pet. 9-23) that the trial court erred in failing to make a more detailed inquiry into juror attitudes about race, welfare benefits, and the weight to be given testimony of law enforcement officers. She also renews her challenges to the admission of evidence indicating petitioner's involvement in other wrongful activity. These arguments were properly rejected by the court of appeals.

1. "Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*." *Rosales-Lopez* v. *United States*, 451 U.S. 182, 189 (1981) (plurality opinion); see *Ham* v. *South Carolina*, 409 U.S. 524, 528 (1973); *Aldridge* v. *United States*, 283 U.S. 308, 310 (1931). The court may conduct the voir dire itself or allow the parties to conduct it. Fed. R. Crim. P. 24(a). In all events, it has " 'a broad discretion as to the questions to be asked.' " *Rosales-Lopez*, 451 U.S. at 189 (quoting *Aldridge*, 283 U.S. at 310). Absent a showing of particularized need for a special line of questioning, there is no abuse of discretion in refusing to ask specific questions during the voir dire examination, even though the questioning might theoretically aid the defendant in exercising peremptory challenges. See, *e.g.*, *United States* v. *Toomey*, 764 F.2d 678, 682 (9th Cir. 1985) (the trial court did not abuse its discretion in refusing to inquire as to jurors' attitudes toward narcotics); *United States* v. *Jones*, 722 F.2d 528, 529-530 (9th Cir. 1983) (absent a showing of a reasonable possibility of prejudice, the trial court did not abuse its discretion in refusing to

inquire whether jurors were biased against defense of coercion).

a. These general principles apply in the case of voir dire requests directed toward racial or ethnic bias. In *Rosales-Lopez*, a majority of the Court agreed that there is a constitutional obligation to make specific inquiries concerning racial bias only when racial issues are " 'inextricably bound up with the conduct of the trial,' " 451 U.S. at 189 (quoting *Ristaino* v. *Ross*, 424 U.S. 589, 597 (1976)); see 451 U.S. at 194-195 (Rehnquist, J., concurring in the result).[1] Petitioner failed to show that racial issues are present in the instant case. Significantly, this case involves theft of government property rather than an interracial crime. As the court of appeals observed (Pet. App. 5), this case, like *Rosales-Lopez*, simply involves government prosecution of a minority defendant and raises no "special circumstances" or reasonable possibility of racial prejudice. Contrary to petitioner's contention (Pet. 13), there is no reason to assume that a jury will be influenced by racial prejudice simply because a black defendant is tried for welfare fraud. Moreover, the district judge addressed the possibility of racial prejudice by asking the veniremen if they observed

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[1]In *Rosalez-Lopez*, a defendant of Mexican descent was charged with smuggling aliens into the United States. He contended that the trial court committed reversible error in denying his request for a voir dire examination of prospective jurors about racial or ethnic prejudice. This Court rejected the contention, indicating that the federal courts must make such an inquiry where "the external circumstances of the case indicate a reasonable possibility that racial or ethnic prejudice will influence the jury's evaluation of the evidence." 451 U.S. at 192-193 (White, J.). Because the defendant in *Rosales-Lopez* failed to demonstrate special circumstances and the trial court eliminated the possibility of undisclosed racial prejudice through its other inquiries, this Court held that the trial court did not abuse its discretion in refusing to make the requested inquiries concerning ethnic bias. 451 U.S. at 194; *id.* at 194-195 (Rehnquist, J., concurring in the result).

anything about petitioner "which in any way, however subtly, might prejudice" them against her. See Pet. App. 5-6.

b. The district judge also acted within his discretion in refusing to inquire into the prospective jurors' possible bias respecting testimony from law enforcement officers. As petitioner herself acknowledges (Pet. 19-20), the need for such an inquiry depends upon the facts of each case. The failure to conduct such an inquiry cannot constitute reversible error where, as here, there was no dispute concerning the credibility of the single law enforcement officer who testified. See, *e.g.*, *United States* v. *Vadino*, 680 F.2d 1329, 1336-1337 (11th Cir. 1982); *United States* v. *Spaar*, 748 F.2d 1249, 1253-1254 (8th Cir. 1984); see also *United States* v. *Baldwin*, 607 F.2d 1295, 1298 (9th Cir. 1979). Indeed, as the court of appeals noted (Pet. App. 8), the officer's testimony did not significantly conflict with petitioner's testimony.

c. Likewise, the district court acted within its discretion in refusing to ask petitioner's requested questions concerning the prospective jurors' attitudes toward welfare fraud. Even assuming that a trial court should inquire into juror attitudes toward the crimes charged, the district judge substantially fulfilled petitioner's request by asking "whether there was 'anything in the nature of the offense charged' " that might prejudice the jurors against petitioners (Pet. App. 8-9). See *Aldridge*, 283 U.S. at 310 (recognizing the trial judge's "broad discretion as to the questions to be asked"); *United States* v. *Toomey*, 764 F.2d at 682.

2. Petitioner also contends (Pet. 24-27) that the district court erred in admitting evidence of petitioner's other wrongful conduct and evidence indicating that her illegal activities were part of a larger welfare fraud scheme. These claims are insubstantial.

a. The government offered testimony from Mikela Turner-Stroud, petitioner's fellow employee at Blue Cross Insurance Company (Pet. App. 9-10; Tr. 207). The witness testified, among other matters, that petitioner had admitted submitting false drug prescription claims to Blue Cross during the time that she was cashing AFDC checks (Tr. 266-268).

The district judge did not abuse his discretion in permitting this testimony. Evidence of prior wrongful conduct is admissible to prove motive, knowledge, or intent (Fed. R. Evid. 404(b)), although the evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice (Fed. R. Evid. 403). That determination rests within the discretion of the district court. See, *e.g.*, *United States* v. *Jardina*, 747 F.2d 945, 952 (5th Cir., 1984), cert. denied, No. 84-6232 (Mar. 18, 1985); *United States* v. *Gustafson*, 728 F.2d 1078, 1082-1084 (8th Cir. 1984), cert. denied, No. 83-1931 (Nov. 5, 1984); *United States* v. *Bailleaux*, 685 F.2d 1105, 1110-1112 (9th Cir. 1982).

Petitioner claimed, as her sole defense, that she did not intentionally engage in welfare fraud because she thought that the AFDC checks were properly issued to her. Turner-Stroud's testimony, demonstrating petitioner's similar fraudulent activities contemporaneous with the welfare fraud, was thus relevant to prove intent. The court could reasonably conclude that its probative value outweighed the possibility of unfair prejudice.[2] Furthermore, the district judge

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[2]The Ninth Circuit has suggested that such evidence, at least when involving crimes, should be "clear and convincing." See *United States* v. *Bailleaux*, 685 F.2d 1105, 1109-1110 (9th Cir. 1982). The court of appeals, citing *Bailleaux*, agreed with the district court that the evidence was admissible (Pet. App. 10-11). The evidence, a specific admission from petitioner to a fellow employee, had clear and convincing probative value. Notably, other courts do not require evidence admitted

did not err in failing to give a cautionary instruction concerning Turner-Stroud's testimony since none was requested (Pet. App. 11).

b. Petitioner also challenges (Pet. 26-27) the court's admission of testimony from FBI Agent Jason Moulton indicating that petitioner's activities were part of a large-scale welfare fraud scheme. See Pet. App. 11-13; Tr. 289. That brief discussion of the larger scheme was necessary to explain the government's grant of prosecutorial immunity to Turner-Stroud. The judge gave a cautionary instruction explaining the purpose of the testimony (Pet. App. 12-13). The instruction is presumed effective to remedy any potential prejudice. See, *e.g.*, *United States* v. *Johnson*, 618 F.2d 60, 62 (9th Cir. 1980). Thus, the court of appeals correctly rejected petitioner's contention of reversible error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1985

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under Rule 404(b) to meet a "clear and convincing" probity standard. See *United States* v. *Jardina*, 747 F.2d at 952; *United States* v. *Beechum*, 582 F.2d 898, 913 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979); but see *United States* v. *Gustafson*, 728 F.2d at 1083.